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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THOMAS E. HARPER and DIANNE KEENE, Individually and On Behalf of All Others Similarly Situated

Plaintiffs,

vs.

SMART TECHNOLOGIES INC., DAVID A. MARTIN, NANCY L. KNOWLTON, G.A. FITCH, SALIM NATHOO, ARVIND SODHANI, INTEL CORPORATION, APAX PARTNERS, MORGAN STANLEY & CO. INC., DEUTSCHE BANK AG, and RBC DOMINION SECURITIES, INC.

Defendants.

No. 4:11-cv-05232-SBA

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTION TO REMAND

DATE: March 13, 2012
TIME: 1:00 p.m.
DEPT: Courtroom 1, 4th Floor

Hon. Saundra Brown Armstrong

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I. INTRODUCTION

Cases asserting claims solely under the Securities Act of 1933 (the "1933 Act") as amended by SLUSA, are not removable. Only cases asserting class action claims based upon state securities laws are removable. This interpretation is consistent with Congress's intent in enacting SLUSA – to bar securities class actions based upon state law.

While defendants claim that allowing cases asserting only federal 1933 Act claims to remain in state court is an absurd result, this is not so because since 1933, plaintiffs have had the statutory right to proceed under the federal 1933 Act in state court. The primary purpose of SLUSA was to preclude securities class actions based upon state law from proceeding in either state or federal court. Therefore, the fact that the 1933 Act post-SLUSA continues to allow plaintiffs to proceed in state court is far from an absurd result and it is altogether unremarkable that Congress chose to continue to allow state courts concurrent jurisdiction over 1933 Act claims, even class claims.[1]

Ninth Circuit precedent confirms that Plaintiffs may proceed with their 1933 Act claims in state court. In *Madden v. Cowen & Co.,* 576 F.3d 957 (9th Cir. 2009), the Ninth Circuit interpreted the impact of SLUSA's amendments to the 1933 Act's removal bar, 15 U.S.C. §77v(a), §77p(b) and (c). The Ninth Circuit held only claims that are precluded from being maintained by §77p(b) are removable to federal court under §77p(c). And the Ninth Circuit confirmed that only actions based upon state law are precluded. Accordingly, state courts retain concurrent jurisdictions over 1933 Act claims such as those brought forth in the present case and those claims are not precluded.

California state appellate precedent also confirms this result. Most recently, in *Luther v. Countrywide Fin. Corp.,* 195 Cal. App. 4th 789 (2011), California's Court of Appeal for the Second District reinstated a complaint that asserted 1933 Act claims in state court, confirming that SLUSA

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[1] In the introduction of their opposition to the motion for remand ("Defs.' Opp."), Defendants claim that "Plaintiffs cannot cite to any binding authority to support their untenable position that *federal courts* are required to hear *state law* claims while *state courts* are required to hear *federal law* claims about the same issues." This statement mischaracterizes Plaintiffs' argument that the 1933 Act provided for concurrent jurisdiction between state and federal courts. Plaintiffs do not contend that federal courts are required to hear state law claims, only that SLUSA provides that class action securities claims based on state law are removable to federal court.

did not remove the concurrent jurisdiction of state courts over 1933 Act claims. The defendants in *Luther* appealed the decision to the California Supreme Court, which denied review. (review denied Sept. 14, 2011). The decision was also appealed to the United States Supreme Court which denied *certiorari*. *Countrywide Fin. Corp v. Luther,* No. 11-572, 2011 WL 5295222 (Dec. 5, 2011). If the Supreme Court sought to foreclose plaintiffs' ability to proceed in state courts under the 1933 Act, it could have easily done so by taking the appeal and overturning *Luther*.

In this case, Plaintiffs assert only federal claims under the 1933 Act. These federal claims are not precluded and, therefore, are not removable from state court. Accordingly, the Court should grant Plaintiffs' motion to remand.[2]

II. STATEMENT OF ISSUES TO BE PRESENTED

Whether this action, which asserts claims solely under the Securities Act of 1933, should be remanded to state court.

III. STATEMENT OF RELEVANT FACTS

On September 27, 2011, Plaintiffs Thomas Harper and Dianne Keene filed a state court class action complaint in California Superior Court, County of San Francisco, alleging violations of the Securities Act of 1933. The complaint was filed against Defendants Smart Tech, the individuals who signed the registration statements, as well as Intel Corporation, Apax Partners, Morgan Stanley & Co. Inc., Deutsche Bank AG, and RBC Dominion Securities Inc. Although a federal class action complaint was filed on January 26, 2011 asserting securities law violations against Defendant Smart Tech and several individual directors of Smart Tech, the present action contained substantively different allegations, and different defendants, than the federal complaint and also took into account damages suffered by the second drop in Smart Tech stock on May 19, 2011. (*See, e.g.*, Section 11(e) of the 1933 Act: Measure of damages shall represent the difference between the price paid for the security and the value thereof as of the time such suit was brought. 15 U.S.C. §77k(e)). This action

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[2] For the reasons set forth in Plaintiffs' Memorandum in Opposition to Defendants' Motion to Transfer (*see* ECF No. 23 at 3-7), which are incorporated herein by reference, the Court should decide Plaintiffs' remand motion prior to determining the Defendants' motion to transfer.

takes into account all claims concerning 1933 Act violations from the time of the Initial Public Offering until the complaint was filed in September 2011. The federal action, originally filed in January 2011 and amended on November 4, 2011 to add defendants Intel Corporation and Apax Partners and to conform their claims to those asserted in this action cannot take into account damages sustained by investors after the date the federal complaint was originally filed. *Id.*

Defendants removed this case to federal court on October 26, 2011 and filed a Motion to Transfer the case to the Southern District of New York on November 8, 2011. Plaintiffs moved to remand this action on November 9, 2011.

IV. ARGUMENT

A. The Plain Language of SLUSA Precludes Removal of Plaintiffs' 1933 Act Claims

The plain language of SLUSA and the 1933 Act allows for only one conclusion: complaints that allege any claims based on state law – even if they also include 1933 Act claims – are removable to federal court. Conversely, where, as here, a 1933 Act case that is properly filed in state court and does not assert claims "based on the statutory or common law of any State," SLUSA §77p(b) does not allow for, and the §77v(a) 1933 Act expressly prohibits removal of that the action. The statutory provisions of the 1933 Act as amended by SLUSA compel the conclusion that remand is required here. Remand of the 1933 Act claims to state court is clearly the majority view among those federal courts that have considered the issue, and it is the only result that is consistent with the plain language of the 1933 Act as amended by SLUSA itself.

On its face, SLUSA limits removal to class actions "based upon the statutory or common law of any State or subdivision thereof." 15 U.S.C. §77p(b). Nothing in Defendants' opposition can alter the clear and unambiguous limitations on removal set forth under SLUSA. "'[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others … courts must presume that a legislature says in a statute what it means and means in a statute what it says there … When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Luther* 195 Cal. App. 4th at 794 (quoting *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992)).

The "state law" limitation in §77p(b) is incorporated into §77p(c) – SLUSA's removal provision – which provides that "[a]ny covered class action brought in any State court involving a covered security, ***as set forth in subsection (b) of this section,*** shall be removable to the Federal district court for the district in which the action is pending, and ***shall be subject to subsection (b) of this section***." 15 U.S.C. §77p(c).[3] It is not contested that this action asserts claims arising solely under the 1933 Act. It is therefore not removable under §77p(c), and thus does not fall within the limited exception to the 1933 Act's anti-removal provision. 15 U.S.C §77v(a).

Defendants' reading of the statute would eliminate the concurrent state and federal court jurisdiction and render the statute's anti-removal bar superfluous – which runs counter to principles of statutory interpretation and violates that clear purpose of the amendments to the 1933 Act, as evidenced by the plain language of the statute.[4] *See, e.g., Kircher v. Putnam Funds Trust,* 547 U.S. 633, 642-43 (2006)(explaining that "[W]e see no reason to reject the straightforward reading [of SLUSA §77p(c)]: removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b) ….[I]f we did read the removal power that broadly there would be no point to the phrase 'as set forth in subsection (b)'") *Breuer v. Jim's Concrete of Brevard, Inc.,* 538 U.S. 691, 696-97 (2003) (stating that the anti-removal provision in the 1933 Act is an "indisputable prohibition of removal" that Congress set forth in "unmistakable terms").

If Congress sought to eliminate plaintiffs' ability to file cases asserting claims solely under the 1933 Act in state courts, it would have expressly amended the 1933 Act to either eliminate the

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[3] Unless otherwise noted, all emphasis is added and citations are omitted.

[4] Significantly, Defendants' proposition that "SLUSA mandated that federal court be 'the exclusive venue for class actions alleging fraud in the sale of certain covered securities,'" is inapplicable to this action. The case cited for this proposition (*California Pub. Emps.' Ret. Sys. v. Worldcom, Inc.,* 368 F.3d 86 (2d Cir. 2004)), unlike this matter, specifically alleges fraud in the sale of securities. Plaintiffs make no allegation of fraud in the sale of securities against Defendants, and instead bring strict liability claims that the registration statement contained an untrue statement of material fact or omitted to state a material fact required to be stated. *See* Complaint ¶1, Section 11(a) of the 1933 Act, 15 U.S.C. §77k(a). Further, *Patenaude v. Equitable Life Assur. Soc'y of the United States,* 290 F.3d 1020 (9th Cir. 2002) is wholly inapplicable as most of the analysis dealt with the bankruptcy code. In *Worldcom,* the securities allegations were deemed to be "related to" a bankruptcy case and thus were properly removed under the bankruptcy removal statute. *Worldcom,* 368 F.3d 86.

concurrent jurisdiction language in section 77k(a) or the removal bar in section 77v(a). Congress has not done so, and definitely did not do so when it enacted SLUSA.

B. This Action Was Improperly Removed Under Ninth Circuit Precedent

Defendants argue that §77v(a) of the 1933 Act, which bars removal of cases brought in state court, does not apply to this action which asserts only federal claims. This action, however, is subject to §77v(a) and is therefore not removable. Under §77v(a), an action is not removable unless it falls within the exception provided by §77p(c). And Ninth Circuit precedent confirms that those exceptions do not apply to this action.

In *Madden,* 576 F.3d 957, the Ninth Circuit explained removal under the 1933 Act and, particularly, how §77p(b) and §77p(c) interact. First, §77p(b) generally precludes certain class actions from being maintained in any state or federal court by any party when specific threshold requirements are met. *Madden* enumerated these requirements as follows:

> [An] action will fall within SLUSA's preclusion provision if the action is (1) a"covered class action" (2) "***based upon the statutory or common law" of any state*** (3) being maintained by "any private party," and if the action alleges (4) either "an untrue statement or omission of material fact" or "that the defendant used or employed any manipulative or deceptive device or contrivance" (5) "in connection with the purchase or sale" (f) of a "covered security." 15 U.S.C. §77p(b).

Id. at 965. Accordingly, under the 1933 Act, if a claim does not meet all the requirements, such as not being based on state law, it is not precluded and may be brought in state or federal court under §77p(b).[5] If the claim does meet all the threshold requirements, then it is precluded from being

[5] Similarly, in *Proctor v. Vishay Intertechnology, Inc.,* 584 F.3d 1208 (9th Cir. 2009), decided two months after *Madden,* the Ninth Circuit confirmed a threshold requirement for removability under SLUSA: that the claim must be "based upon the statutory or common law of any State…." *Id.* at 1221 n.11 (quoting 15 U.S.C. §77bb(f)(1)). While *Proctor* analyzed the impact of SLUSA upon the Securities Exchange Act of 1934, it noted that SLUSA amended the 1933 Act "in substantially identical ways." *Proctor,* 584 F.3d at 1213 n.1 (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,* 541 U.S. 71, 82 n.6 (2006)). Indeed, the sections regarding removability in the Securities Exchange Act of 1934 are nearly identical to the 1933 Act. *Compare* 15 U.S.C. §§77p(b) & (c) *with* 15 U.S.C. §§78bb(f)(1)&(2).

brought in state court.[6]

Madden then explained how §77p(c) (Removal of covered class actions) interacts with §77p(b) (Class action limitation):

> To prevent actions precluded by SLUSA from being litigated in state court, SLUSA authorizes defendants to remove such actions to federal court, effectively ensuring that federal courts will have the opportunity to determine whether a state action is precluded. As the Supreme Court has explained, any suit removable under SLUSA's removal provision, §77p(c), is precluded under SLUSA's preclusion provision, §77p(b), ***and any suit not precluded is not removable.***

Id. 576 F.3d at 964-65 (citing *Kircher*, 547 U.S. at 644). *Madden* continued, "if a federal court determines that an action is not precluded, it 'has no jurisdiction to touch the case on the merits, and the proper course is to remand to the state court that can deal with it.'" *Madden,* 576 F.3d at 965 (quoting *Kircher,* 547 U.S. at 644).

Thus, *Madden* rejects the notion that removal under §77p(c) encompasses claims precluded by §77p(b). Therefore, the phrase "as set forth in subsection (b) "in §77p(c) incorporates the requirement that the claim be based upon state law. *Madden* also supports Plaintiffs' interpretation of *Kircher*. Moreover, *Madden's* interpretation of §77p(b) and §77p(c) is entirely consistent with Congress' stated purpose in enacting SLUSA which was "to limit the conduct of securities class actions under State law." *See* Pub. L. No. 105-353, 112 Stat. 3227 (1998).

Because Plaintiffs assert only federal claims, they are not precluded by §77p(b) from bringing theses claims in state court and, therefore, the claims are not removable under §77p(c). *See Madden,* 576 F.3d at 964-65. Accordingly, the Court should grant Plaintiffs' motion for remand.

C. State Courts Continue to Have Concurrent Jurisdiction over Cases Asserting Only 1933 Act Claims

Defendants also argue that SLUSA amended §77v(a) of the 1933 Act to eliminate concurrent jurisdiction in state courts for all covered class actions. (Defs.' Opp. at 6). While SLUSA added the language under §77v(a) "except as provided in §77p of this title with respect to covered class action"

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[6] It was the increase in the number of securities class actions based upon state law following passage of the Private Securities Litigation Reform Act of 1995 that prompted Congress to enact SLUSA. Through SLUSA, Congress barred most securities class actions based upon state law.

to limit the concurrent jurisdiction of state courts with respect to securities class actions claims based on state law, it did not eliminate concurrent jurisdiction for class actions alleging only federal claims under the 1933 Act. Class actions alleging only federal claims brought in state court are not precluded by SLUSA.

The flaw in Defendants' argument is that it requires the Court to isolate §77p(f)(2)(A)'s definition of "covered class action" from the rest of §77p. But that is not how Congress wrote §77v(a), and ignoring whole portions of statutory sections is not how the Supreme Court instructs courts to interpret statutes. *See Kirchner,* 547 U.S. at 643 (courts "do not read statutes in little bites").

Instead, §77v(a) refers to all of §77p and not just the subsection (f)(2)(A)'s definition of covered class actions. Thus, this Court must review all of §77p and not just the one subsection Defendants find supportive of their argument. In particular, because the phrase "except as provided in Section 77p of this title with respect to covered class action" limits the concurrent jurisdiction of state courts, the Court should look to the subsections that fulfill the function of limiting state court concurrent jurisdiction.

Two subsections of §77p fit most naturally and logically with the exception to state court concurrent jurisdiction carved out by SLUSA's amendment of §77v(a). They are subsections 77p(b) and 77p(c). As explained by *Madden,* §77p(b) precludes covered class actions ***based upon state law*** alleging an "untrue statement or omission of material fact" or the use of "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of a covered security." 576 F. 3d at 965. §77p(c) allows for the removal to federal court of covered class actions precluded by §77p(b), *i.e.,* those based upon state law. In contrast, section 77p(f) simply provides the definitions for subsections 77p(a)-(d); it does not provide any limitations to the concurrent jurisdiction of section 77v(a). Defendants' argument wholly ignores the rest of §77p. This interpretation of §77v(a) is also entirely consistent with Congress's intent in enacting SLUSA – to bar state-law class actions – and gives meaning to each provision of §77v(a).

D. *Knox v. Agria* Does Not Represent the Majority Position on Whether Cases Asserting Exclusively 1933 Act Claims Are Removable

In their opposition, Defendants repeatedly cite to *Knox v. Agria Corp.,* 613 F. Supp. 2d 419 (S.D.N.Y. 2009), and to the ruling as "agreeing with the majority position" that 1933 Act claims, such as those asserted here, are removable. Defs.' Opp. at 7. The *Knox* ruling, however, is not universally accepted. *Luther,* 195 Cal. App.4th at 798 (collecting cases).

Knox also suffers from flawed logic. *Knox* deemed the statutory reference in section 77p to be a reference to a definition of "covered class action" in section 77p(f)(2). *Luther*, 195 Cal.App.4th at 797. But instead of "analyzing the application of the other parts of section 77p, *Knox* found that those subsections were irrelevant to the analysis because they dealt exclusively with state law claims." *Id.* Then, *Knox* exempted all covered class actions from concurrent jurisdiction based on the definition of covered class action. *Luther,* 195 Cal. App. 4th at 797-98. "In other words, *Knox* ignored the verb in the statute, and reached its conclusion by looking only at the noun." *Luther,* 195 Cal. App. 4th at 798.

Knox and comparable cases suffer from yet another flaw. These cases came to their conclusions because "no other rule is consistent with what they perceive as legislative intent." *Id.* *Knox* cited a conference report (H.R. Conf. Rep. No. 105-803) stating that, in enacting SLUSA, Congress intended to make the federal courts the exclusive venue for most securities class actions. *Id.* *Knox* then incorrectly reasoned that ***all*** securities class actions must be removable[7] and "any other reading would make no sense." *Luther,* 195 Cal. App. 4th at 798-99. "However, an intent to prevent ***certain*** class actions does not tell us that this class action, or all securities class actions must be brought in federal court." *Id.* (Emphasis in original).

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[7] The case cited by Defendants, *Northumberland County Retirement Sys. v. GMX Resources, Inc.*, No. 11-cv-520, 2011 WL 5578963 (W.D. Okla. Nov. 16, 2011), quotes the same conference report as *Knox*, and makes the same illogical leap that ***all*** securities class actions are removable.

E. SLUSA's Legislative History Also Shows Congress Did Not Intend to Strip State Courts of Concurrent Jurisdiction

Finally, Defendants are wrong about SLUSA's legislative history. Indeed, their legislative history argument stems from comments made by individual members of Congress, who cannot speak for the entire House or Senate. If the members of Congress whose comments are cited by Defendants truly wished for federal courts to be the exclusive venue for securities class actions, they would have added the necessary language to eliminate the 1933 Act's concurrent jurisdiction and removal bar.

SLUSA was passed three years after the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The PSLRA imposed certain heightened pleading requirements in cases alleging securities fraud under the Securities Exchange Act of 1934. Importantly, the heightened pleading requirements do not apply to the strict liability and negligence claims that investors may assert under the 1933 Act. Instead, the heightened pleading requirements of the PSLRA applied only to the securities fraud claims set forth in the Securities Exchange Act of 1934.

Following passage of the PSLRA, investors began filing securities fraud claims under Blue Sky Laws in state court to evade the new pleading requirements. To close the perceived loophole, Congress passed SLUSA. This is why "class action limitation" language in section 77p(c) of the 1933 Act tracks the language of Section 10(b) of the Securities Exchange Act of 1934:

> Class action limitations
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging -
>
> **(1)** ***an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or***
>
> **(2)** ***that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.***

15 U.S.C. §77p(b).

This is the same language used in section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Those are the seminal provisions under which a plaintiff can bring a claim for ***securities fraud.*** *See* 15 U.S.C. §78j(b); 17 C.F.R. §240.10b-5.

Thus, the language that Defendants cite refers to an investor's use of state Blue Sky Laws to file a securities fraud suit that would otherwise be brought under the Securities Exchange Act of 1934 to evade the PSLRA's heightened pleading requirements.[8] It absolutely does not stand for the proposition that Congress intended to eliminate the concurrent state and federal court jurisdiction provisions that remained in the 1933 Act, or to eliminate the anti-removal bar for stand-alone 1933 Act claims. This interpretation is consistent with other parts of the legislative history, which are discussed in Plaintiff's Motion to Remand and Memorandum in Support Thereof. (*See* ECF No.14 at 12-14).

The Findings provision of SLUSA, quoted by Defendants, contradicts Defendants' argument and demonstrates the distinction between strict liability and negligence claims under the 1933 Act and suits alleging fraud under the Securities Exchange Act of 1934. The key sections of the Findings provision state:

> The Congress finds that -
>
> 1) the Private Securities Litigation Reform Act of 1995 sought to prevent abuses in private securities *fraud* lawsuits;
>
> * * *
>
> 5) in order to prevent certain State private securities class action lawsuits alleging ***fraud*** from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

Pub. L. 105-353, 112 Stat. 3227 §2.

Thus, the Findings provision of SLUSA further supports Plaintiffs' position that this case is not removable and should be remanded to state court.

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[8] Specifically, Defendants refer to the following: "'What [SLUSA] is all about is simply to realize the intent of the [PSLRA]. It does this by making sure that class action suits with securities that are traded on the three major securities trading exchanges to have to be subject to the rules that we passed last time and have to go to federal court.'" and "The purpose of this title is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal court." *See* Defs.' Opp. at 12-13.

V. CONCLUSION

It is for these reasons, and the reasons set forth in the Plaintiffs' memorandum in support of remand, that this action be remanded to California Superior Court, County of San Francisco.

DATED: December 16, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2011, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

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